243 Ga. 710
BAKER
v.
The STATE.
No. 34588.

Supreme Court of Georgia.

Argued March 13, 1979.
Decided May 31, 1979.

Defendant was convicted in the Gwinett Superior Court, Pittard, J., of murder and armed robbery. His case came before the Supreme Court on direct appeal and for mandatory review of the death sentence imposed. The Supreme Court, Marshall, J., held that: (1) those crimes which were capital felonies in the State when death penalty statute was enacted, including armed robbery, continue to be "capital felonies" within meaning of that statute; (2) evidence establishing that homicide victim had been hit with bottle in the face, that three bullets were fired into his chest at point-blank range and that fourth was fired between his legs after he and died supported jury's finding of statutory aggravating circumstances, i. e., that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim; and (3) the death sentence was not excessive or disproportionate to the penalty imposed upon defendant's accomplice, or to the penalty imposed in other cases.

Affirmed.

1. Criminal Law ⇐1208(6)
Robbery ⇐30

Those crimes which were capital felonies in the State when death penalty statute was enacted, including armed robbery, continue to be "capital felonies" within meaning of that statute. Code, § 27-2534.1(b)(2).

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law ⇐1208(1)

Statute authorizing imposition of death penalty where offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim is not unconstitutionally vague. Code, § 27-2534.1(b)(7).

3. Homicide ⇐354

Evidence establishing that homicide victim had been hit with bottle in face, that three bullets were fired into his chest at point-blank range and that fourth was fired between his legs after he had died supported jury's finding of statutory aggravating circumstances, i. e., that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim. Code, § 27-2534.1(b)(2, 7).

4. Homicide ⇐354

In view of fact that defendant was actual perpetrator of murder and armed robbery, of fact that State did not seek death penalty in codefendant's case and of fact that codefendant was more youthful offender that defendant, defendant's sentence to death was not excessive or disproportionate to penalty imposed upon his accomplice, nor was defendant's death sentence excessive or disproportionate to penalty imposed in similar cases considering both crime and defendant. Code, § 27-2534.1(b)(2, 7).

Wynn Pelham, Lawrenceville, for appellant.

Bryant Huff, Dist. Atty., Arthur K. Bolton, Atty. Gen., Nicholas G. Dumich, Sp. Asst. Atty. Gen., for appellee.

MARSHALL, Justice.

The appellant was convicted of murder and armed robbery. He received a death

sentence for the murder conviction and a sentence of life imprisonment for the armed robbery conviction. His case is here on direct appeal and for mandatory review of the death sentence imposed.

I. Summary of the Evidence.

The evidence authorized the jury in finding the following:

On the evening of May 5, 1978, the victim, Dennis Beatenbo, was drinking at a Holiday Inn adjacent to Interstate 85 in Norcross, Georgia. On this same evening, the appellant and Ricky Massey were drinking and driving in the Norcross-Doraville area. At approximately midnight, the victim left the Holiday Inn to go to his car, which was parked nearby at his place of employment. The appellant and Massey passed Beatenbo en route to his car, and they stopped and offered him a ride. In exchange for the ride, Beatenbo offered the appellant and Massey some liquor which he had in his car. In a confession later given by the appellant to police, he stated that when Beatenbo got out of the car to get the liquor, Massey suggested that they "roll him." The three men began riding around together and drinking, and they drove to an isolated spot near a lake. Beatenbo began to get sick and Massey opened the car door so Beatenbo could get out.

In his confession to police, the appellant stated that as Beatenbo was lying on the back seat with his head hanging down, the appellant hit him over the head with a liquor bottle; that Beatenbo fell out of the car; and that the appellant then took his watch and wallet. As stated by the appellant, "I reached in my belt with my right hand and pulled out my pistol and the guy was still laying [*sic*] on his back. I pointed the gun at the man and I pulled the trigger, I don't know how many times I shot him, but I could hear him moaning and trying to say something."

Medical testimony established the cause of death as a gunshot wound to the chest. It was also established that the victim had been hit with the bottle in the face, rather than on the back of his head, and that the victim received a total of four gunshot wounds. Three of the gunshot wounds were fired into the victim's chest at point-blank range, and the fourth gunshot was fired between his legs after he had died. The bullets recovered from the victim's body were shown to have been fired from the appellant's gun.

In mitigation, the appellant introduced evidence depicting a rather harrowing history of child abuse.

II. Enumerations of Error.

There are two enumerations of error in this appeal.

[1] 1. First, the appellant argues that the death penalty can no longer be imposed under Code Ann. § 27-2534.1(b)(2) (Ga.L. 1973, pp. 159, 163) on the ground that the murder was committed while the offender was engaged in the commission of another capital felony, to wit, armed robbery, since armed robbery is no longer a capital felony. *Collins v. State*, 239 Ga. 400, 236 S.E.2d 759 (1977); *Gregg v. State*, 233 Ga. 117, 210 S.E.2d 659 (1974).

It has already been decided in *Peek v. State*, 239 Ga. 422, 431, 432, 238 S.E.2d 12 (1977) that those crimes which were capital felonies in Georgia at the time Code Ann. § 27-2534.1(b)(2) was enacted, including armed robbery, continue to be "capital felonies" within the meaning of the statute. This enumeration of error is therefore without merit.

2. In the second enumeration of error, the appellant argues that the trial court erred in overruling his motion to strike the statutory aggravating circumstance found at Code Ann. § 27-2534.1(b)(7), which authorizes imposition of the death penalty where "[t]he offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, a depravity of mind, or an aggravated battery to the victim."

[2] The appellant argues that this statutory aggravating circumstance could not support imposition of the death penalty in this case, since there was no evidence of

torture or an aggravated battery to the victim, and since the phrase "depravity of mind" is unconstitutionally vague. The argument that Code Ann. § 27-2534.1(b)(7) is unconstitutionally vague was rejected by the Supreme Court of the United States in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and by this court in *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976) (cert. den., 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 251 (1977)).

Whether the evidence supports imposition of the death penalty under these two statutory aggravating circumstances, which were found by the jury, will be addressed in the sentence review, infra.

III. Sentence Review.

1. Was the sentence of death imposed under the influence of passion, prejudice, or any other arbitrary factor? We conclude that it was not.

[3] 2. Does the evidence support the jury's finding of statutory aggravating circumstances?

In this case, the jury found that the offense of murder was committed while the defendant was engaged in the commission of another capital felony, to wit, armed robbery. Code Ann. § 27-2534.1(b)(2). In addition, the jury found that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim. Code Ann. § 27-2534.1(b)(7).

We conclude that the evidence supports the jury's finding of these statutory aggravating circumstances.

[4] 3. Is the sentence of death excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant?

The appellant's accomplice, Ricky Mansey, was also tried for murder and armed robbery; and Mansey was sentenced to life imprisonment. See *Mansey v. State*, 243 Ga. 228, 253 S.E.2d 196. The initial question presenting itself is whether the appellant's death sentence is disproportionate to the penalty imposed in *Mansey's* case. We find relevant distinctions between *Mansey's* case and Baker's case, which warrant imposing the severer sanction in this case and not in *Mansey's*. First, it is undisputed that the appellant was the actual perpetrator of the murder and armed robbery; whereas, the proof of Mansey's participation in the murder and armed robbery is not so unequivocal. Second, the state did not seek the death penalty in Mansey's case. Third, Mansey is a more youthful offender than the appellant. Mansey was 16 years of age at the time the crimes were committed.

In sum, we find that the appellant's sentence to death is not excessive or disproportionate to the penalty imposed in the case of his accomplice, Ricky Mansey. In determining whether the appellant's death sentence is excessive or disproportionate to the penalty imposed in other similar cases, we have considered the cases appealed to this court since January 1, 1970, in which a death or life sentence was imposed for murder, and we find that these similar cases set forth in the appendix support affirmance of the death penalty. Daniel Baker's sentence to death for murder is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant; the verdict is factually supported.

We have reviewed the instructions given by the trial judge during the sentencing phase and find that they are not subject to the defects dealt with in our decisions in *Fleming v. State*, 240 Ga. 142, 240 S.E.2d 37 (1977) and *Hawes v. State*, 240 Ga. 227(9), 240 S.E.2d 833 (1977).

Judgment affirmed.

All the Justices concur.

APPENDIX

Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974); *Floyd v. State*, 233 Ga. 280, 210 S.E.2d 810 (1974); *Moore v. State*, 233 Ga. 861, 213 S.E.2d 829 (1974); *Mitchell v. State*, 234 Ga. 160, 214 S.E.2d 900 (1975); *Berryhill v. State*, 235 Ga. 549, 221 S.E.2d 185 (1975); *Smith v. State*, 236 Ga. 12, 222

S.E.2d 308 (1976); *Dobbs v. State*, 236 Ga. 427, 224 S.E.2d 3 (1976); *Pulliam v. State*, 236 Ga. 460, 224 S.E.2d 8 (1976); *Birt v. State*, 236 Ga. 815, 225 S.E.2d 249 (1976); *Young v. State*, 237 Ga. 852, 230 S.E.2d 287 (1976); *Douthit v. State*, 239 Ga. 81, 235 S.E.2d 493 (1977); *Corn v. State*, 240 Ga. 130, 240 S.E.2d 694 (1977); *Stanley v. State*, 240 Ga. 341, 241 S.E.2d 173 (1977); *Campbell v. State*, 240 Ga. 352, 240 S.E.2d 828 (1977); *Thomas v. State*, 240 Ga. 390, 242 S.E.2d 1 (1977); *Alderman v. State*, 241 Ga. 496, 246 S.E.2d 642 (1978); *Redd v. State*, 242 Ga. 876, 252 S.E.2d 393 (1979).

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 27, 1980

William H. Allen, Esq.
Covington & Burling
888 - 16th St., N.W.
Washington, DC 20006

RE: Daniel Joseph Baker
v. Georgia
No. 79-5567

Dear Mr. Allen:

The Court today entered the following order in the above-entitled case:

"The motion of petitioner for leave to proceed in forma pauperis and the petition for writ of certiorari is granted. The judgment is vacated insofar as it leaves undisturbed the death penalty imposed and the case is remanded to the Supreme Court of Georgia for further consideration in light of Godfrey v. Georgia, 446 U.S.___(1980)."

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Francis J. Lorson

Francis J. Lorson
Deputy Clerk

Appendix B

248 Ga. 259

BAKER

v.

The STATE.

No. 34288.

Supreme Court of Georgia.

Sept. 8, 1980.

Defendant was convicted in the Gwinett Superior Court, Pittard, J., of murder and armed robbery, and he appealed and sought review of death sentence imposed. The Supreme Court, Marshall, J., 243 Ga. 710, 257 S.E.2d 192, affirmed, and defendant sought writ of certiorari. The United States Supreme Court, 446 U.S. 420, 100 S.Ct. 2996, 64 L.Ed.2d 820, vacated and remanded. The Supreme Court held that evidence establishing that homicide victim had been hit with bottle in face, that three bullets were fired into his chest and that after victim was dead, he was shot in scrotum supported jury's finding that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to victim and, thus, imposition of death penalty was proper.

Reaffirmed.

Homicide ⇐354

Evidence establishing that homicide victim had been hit in face with bottle, that three bullets were fired into his chest at point-blank range and that after victim was dead, he was shot in scrotum, was sufficient to support jury's finding that offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim and thus, imposition of death sentence was proper. Code, § 27-2534.1(b)(2, 7).

ADDENDUM TO 248 GA. 710.

By order of the Supreme Court of the United States, this case has, as to sentence only, been vacated and remanded for further consideration by this court in light of *Godfrey v. Georgia*, 446 U.S. 420 (100 S.Ct. 1759, 64 L.Ed.2d 398) (1980); *Baker v. Georgia*, 446 U.S. 961 (100 S.Ct. 2936, 64 L.Ed.2d 820) (1980). Our opinion in this case is reported at 248 Ga. 710, 257 S.E.2d 192 (1979).

In *Godfrey v. Georgia*, supra, the Supreme Court of the United States held that Ga.Code Ann. § 27-2534.1(b)(7) was unconstitutionally applied as to the specific factual circumstance present in that case. Code Ann. § 27-2534.1(b)(7) provides in part: "The offense of murder ... was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

The appellant's sentence of death in this case rests partially upon Code Ann. § 27-2534.1(b)(7).[1]

As mandated, we have reviewed the sentence in this case and this court finds material differences between *Godfrey* and the case under review, which distinguish this murder from the murder in *Godfrey* and from other "ordinary" murders for which the death penalty is not appropriate.

The evidence in this case shows that, unlike *Godfrey*, the victim was not killed instantaneously, he was not a member of the appellant's family, nor was he threatening the appellant in any manner. This was a cold-blooded, planned, execution-type murder perpetrated for the purpose of robbing the victim. The appellant lured his victim into his car and, when his victim was helplessly sick from overintoxication, he struck him in the face with a whiskey bottle with

1. The jury found two statutory aggravating circumstances: Code Ann. §§ 27-2534.1(b)(2) and 27-2534.1(b)(7). Under our decisions, the death penalty in this case may be upheld upon § 27-2534.1(b)(2), which we hold in our opinion to have been proven beyond a reasonable doubt. See the addendum to *Dampier v. State*, 245 Ga. 427, 265 S.E.2d 585 (1980) at 245 Ga. 882, 268 S.E.2d 349 (1980), wherein we reviewed a sentence of death in light of *Godfrey v. Georgia*, supra. *Gates v. State*, 244 Ga. 587, 599(8), 261 S.E.2d 349 (1979).

such force that the bottle was broken. The blow produced extensive crushing of the face and nose of the victim. Thereafter, the appellant shot the victim three times in the chest. The barrel of the pistol was placed directly on the chest of the victim as the weapon was fired. After the victim was dead, the appellant shot him in the scrotum.

The appellant stated that he could hear the victim moaning and attempting to say something as he continued to shoot him.

The jury returned a finding that, beyond a reasonable doubt, the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it involved torture to the victim or depravity of mind on the part of the defendant. As we held in our original opinion, this finding is clearly supported by the evidence as set forth above. *Godfrey v. Georgia* established that torture occurs when the victim is subjected to serious physical abuse before death. *Nance v. State*, 245 Ga. 856, 268 S.E.2d 339 (1980). A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind.

A defendant who mutilates or seriously disfigures the victim's body after death (Cf. Code Ann. § 26-1305) may be found to have a depraved mind.

Under the facts of this case, we find that the murder was of a type universally condemned by civilized society as wantonly vile, horrible or inhuman, as it involved depravity of mind of the defendant and torture to the victim, as set forth above.

Judgment imposing the death penalty reaffirmed.

All the Justices concur.

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

DANIEL BAKER, PETITIONER VS. WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER, RESPONDENT	:	HABEAS CORPUS FILE NO. 5037

ORDER

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Gwinnett County. Petitioner was convicted of Murder and Armed Robbery. He was sentenced to death for murder and to life imprisonment for armed robbery. His convictions and sentences were affirmed by the Supreme Court. Baker v. State, 243 Ga. 710 (1979). The Supreme Court of the United States vacated the death sentence and remanded the case for further consideration in light of Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). Upon reconsideration the Supreme Court reaffirmed the death sentence. Baker v. State, 246 Ga. 259 (1980). Certiorari was denied by the United States Supreme Court. Baker v. Georgia, ____ U.S. ____, 101 S.Ct. 1402, 67 L.Ed.2d 371 (1981).

The Petition, as amended, contains nineteen (19) numbered counts which allege substantive claims for relief. The Court will address these claims for relief by paragraphs corresponding numerically to the counts in the Petition.

The record in this habeas case consists of the transcript of the proceedings before this Court on July 14, 1981, and the transcript and record of Petitioner's trial in the Gwinnett County Superior Court.

I.

In Count I, Petitioner alleges the prosecutor acted improperly, which prejudiced Petitioner's right to a fair trial in violation of his Fifth, Eighth, and Fourteenth Amendment rights.

FINDINGS OF FACT

The Supreme Court has already concluded Petitioner's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Baker v. State, 243 Ga. at 712.

CONCLUSIONS OF LAW

The argument that is improper is that which introduces facts not in evidence and is calculated to prejudice the defendant, not flights of oratory, figurative speech or false logic. Wheeler v. State, 220 Ga. 535, 537 (1965); Leutner v. State, 235 Ga. 77, 84 (1975).

The Court has examined the closing arguments of the prosecutor in both the guilt/innocence and sentencing phases (T.T. 181-185; 268-280) and found nothing improper. While the prosecutor expressed his personal opinion as to Petitioner's guilt in the guilt/innocence phase, the Court finds the action harmless in light of the fact that Petitioner did not contest his guilt. As to the sentencing phase, the prosecutor was properly arguing for the death penalty and offering plausible reasons for his position. Chenault v. State, 234 Ga. 216, 224 (1975); Redd v. State, 242 Ga. 876, 881 (1979).

Accordingly, the allegations in Count 1 are found to be without merit.

2.

In Count 2, Petitioner claims he was denied effective assistance of counsel in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

FINDINGS OF FACT

Petitioner was represented at trial and on appeal by Wynn Pelham. (H.T. 60, 84). Counsel was retained by Petitioner's adopted mother. (H.T. 60). Mr. Pelham agreed to take the case after being asked to do so by a friend of his who was also related to Petitioner by marriage and had explained that Petitioner's family had little money. Id.

Mr. Pelham has been practicing law since 1966. Id. Since 1975, his practice has primarily consisted of criminal law, approximately 70-75% (H.T. 78-79). Petitioner's case was the third death penalty case Counsel had tried against the prosecutor, Mr. Huff, and Counsel obtained life sentences in the two previous cases. (H.T. 79). He had handled a number of non-capital murder cases. Id.

Prior to trial, Counsel filed Motions. (R. 5, 13-16). He had several discussions with the prosecutor and had complete access to the prosecutor's file. (H.T. 44, 64). Counsel testified that at all times Petitioner never denied his guilt. (H.T. 81). Counsel tried to plea bargain for a life sentence, but the prosecutor refused. (H.T. 44, 73). After discussing the issue with Petitioner, Counsel made a conscious decision not to contest the issue of guilt or innocence or offer any evidence during that phase of the trial. (H.T. 68). This decision was based on the evidence of guilt which appeared overwhelming. (H.T. 80). Instead, the prime goal was to get a life sentence. (H.T. 65). Counsel concluded that for Petitioner to have contested his guilt would have destroyed his credibility; instead, they decided to save Petitioner's credibility for the sentencing phase to ask for a life sentence in view of the fact he had admitted his guilt. (H.T. 80-81).

Counsel interviewed only one State's witness prior to trial because he had reviewed the other witnesses' statements in the prosecutor's file and anticipated their testimony and because he was not going to contest the issue of guilt. (H.T. 64-65). He did interview witnesses who would offer mitigating testimony in the sentencing phase. (H.T. 65). He did not challenge the composition of either the grand or traverse jury because he knew from observing some of the hearings that Team Defense had abandoned a jury challenge in Gwinnett County during the year prior to Petitioner's trial. (H.T. 66). Counsel saw no merit in challenging the admissibility of Petitioner's statement to police. (H.T. 83). He had considered mental incompetency as a potential defense, but the results of Petitioner's evaulation at Central State Hospital negated such a defense. (H.T. 84, 90). Finally, Counsel did not see the need for a private investigator. (H.T. 85).

At trial, Counsel made an opening statement (T.T.65-67); cross-examined State's witnesses (T.T. 74; 77; 85; 89; 100; 102; 117; 137; 153; 168); made motions (T.T. 91; 110; 203); gave argument during the guilt/innocence phase of trial (T.T. 185-186); gave argument during the sentencing phase (T.T. 280-302) as well as presenting two witnesses (T.T. 206; 220) in addition to Petitioner in his own behalf. (T.T. 236).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by

hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Petitioner's Counsel easily meets this test. He was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Such decisions as whether to have put Petitioner on the stand or to have asked for funds for experts are among the strategies and tactical decisions which are the exclusive province of the lawyer after consultation with his client. Reid v. State, 235 Ga. 378 (1978). Effectiveness is not measured by how another lawyer may have handled the case. Estes v. Perkins, 225 Ga. 268 (1968); Jones v. State, 243 Ga. 820 (1979).

Accordingly, this claim for relief is found to be without merit.

3.

In Count 3, Petitioner claims the application in this case of the Ga. Code Ann. §27-2534.1(b)(7) aggravating circumstance is unconstitutional.

While the Court finds Petitioner's arguments persuasive, the Supreme Court has already expressly upheld the jury's finding of the (b)(7) aggravating circumstance. Baker v. State, 246 Ga. 259 (1980).

This finding is binding upon this Court for purposes of habeas corpus review. Elrod v. Ault, 231 Ga. 750 (1974).

4.

See paragraph 3.

5.

In Count 5, Petitioner alleges no armed robbery occurred which, in turn, invalidates the Ga. Code Ann. §27-2534.1(b)(2) aggravating circumstance and his death sentence.

The Supreme Court has already concluded the evidence supported the jury's finding of the aggravating circumstances. Baker v. State, 243 Ga. at 712.

6.

The issue in Count 6 has already been decided adversely to Petitioner on direct appeal. Baker v. State, 243 Ga. at 711.

7.

In Count 7, Petitioner claims his constitutional rights were violated when the trial court received the jury's finding of the (b)(2) aggravating circumstance which was incorrectly stated.

FINDINGS OF FACT

The State sought to prove the existence of two aggravating circumstances, Ga. Code Ann. §27-2534.1(b)(2) and (b)(7). (R. 9). With regard to (b)(2), the jury were charged, "...the offense of murder was committed while the offender was engaged in the commission of

an additional felony, to-wit: armed robbery of Dennis Beatenbo." (T.T. 303-304). The jury were also furnished a copy of the aggravating circumstances. (T.T. 307).

The jury found, as one of two aggravating circumstances returned, "The offense of murder was committed while the offender to incident the armed robbery of Dennis Beatenbaugh." (T.T. 309).

The judge asked the jury foreman if they intended the writing to state, "...the offense of murder was committed while the offender was engaged in the commission of an additional felony, to wit: the armed robbery?" (T.T. 309-310). The foreman answered, "Yes, sir." (T.T. 310). The judge then allowed the foreman to correct the language of the verdict to include the entire language of (b)(2). Id.

CONCLUSIONS OF LAW

Though the jury did not write out the exact language of (b)(2), it was clear to the trial judge and the lawyers present that the jury was basing the aggravating circumstance on the armed robbery of the victim. The intent of the jury being clear, it was not error for the trial court to allow the foreman to correct the verdict. Gates v. State, 244 Ga. 587, 599 (1979).

8.

In Count 8, Petitioner alleges he was indicted and convicted by unconstitutionally composed grand and traverse juries.

Petitioner has shown neither cause, as required by Ga. Code Ann. §50-127(1), nor actual prejudice, as required by Francis v. Henderson, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), in order to pursue his objection to the composition of either jury in this habeas proceeding.

Accordingly, this claim for relief is found to be without merit.

9.

In Count 9, Petitioner claims the admission of his alleged involuntary confession violated his Fifth, Eighth, and Fourteenth Amendment rights and corresponding rights under the Georgia Constitution.

FINDINGS OF FACT

At trial, a Jackson-Denno hearing was conducted to determine the admissibility of Petitioner's statement. (T.T. 108-145). The trial court ruled the statement was "admissible and voluntarily made, made after a full explanation of the Miranda rights and it would be admissible in evidence." (T.T. 145).

CONCLUSIONS OF LAW

Petitioner relies upon the recent case of United States v. McCrary, 643 F.2d 323 (5th Cir. 1981), to assert that the waiver of his right to remain silent was invalid because he had not been told he could possibly receive the death penalty.

McCrary does hold that a defendant must know the nature of the offense he is suspected of having

committed before there can be valid waiver. The defendant in McCrary understood he was suspected of drug trafficking and buying and receiving a stolen vehicle. However, the interrogation, to which he had consented, turned out to deal with federal weapons offenses. Such is not the case at hand.

Factual and credibility determinations concerning admissibility of a statement based on voluntariness made by a trial judge are accepted by reviewing courts unless such determinations are clearly erroneous. Johnson v. State, 233 Ga. 58 (1974); Hurt v. State, 239 Ga. 665 (1977).

Petitioner has made no showing that the trial court's determination was in error.

Accordingly, this allegation is found to be without merit.

10.

In Count 10, Petitioner claims the trial court made improper statements to the jury during trial, which violated his constitutional rights. Specifically, Petitioner contends the trial court expressed surprise at the defense resting without presenting any evidence and also implied to the jury they might not hear all evidence against Petitioner.

FINDINGS OF FACT

The statements objected to are as follows:

> "The Court: The State has rested; you may proceed for the Defendant, Mr. Pelham.

Mr. Pelham: I would waive opening and reserve the right to conclude.

The Court: Defendant has no evidence?

Mr. Pelham: I'm sorry, we rest at this point. We offer no evidence.

The Court: Evidence is closed. Defendant has the opening and concluding argument, and you waive the opening?

Mr. Pelham: Waive the opening; reserve the concluding.

The Court: You may proceed for the State."

(T.T. 180-181). (Emphasis added).

"The Court: Ladies and Gentlemen, let me explain. I imagine some of you have never served on a Jury before. How many have served - I just want to explain the procedure, when the Court asks you to step out to - so the Court can entertain a Motion, it's not to hide anything from you in the trial of the case. Sometimes a determination has to be made as to whether certain testify [sic] or articles or things would be admissible, whether it would be legal for you to hear it. So that is the only reason you are excluded from the testimony from time to time."

(T.T. 94-95). (Emphasis added).

CONCLUSIONS OF LAW

Petitioner's allegations are strained interpretations of comments by the trial court. In the first instance, the trial court was simply finding out what procedural steps

the defense had elected to follow. In the second instance, the court was explaining to the jury why they were asked to leave the courtroom. These latter statements would tend to minimize confusion and enlighten jurors who may well have been wondering if they were not hearing everything.

Accordingly, the allegations in Count 10 are found to be without merit.

11.

In Count 11, Petitioner contends the jury charge on malice and intent was impermissibly burden-shifting under Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

FINDINGS OF FACT

The jury were instructed on the presumption of innocence, that the State had the burden of proving such essential element of a crime beyond a reasonable doubt, and that the presumption of innocence remained with the defendant throughout trial until and unless the State overcame the presumption through the introduction of evidence sufficient to convict the accused beyond a reasonable doubt. (T.T. 189).

The jury were told the question of intention could only be answered by them; that the acts of a person of sound mind and discretion are presumed to be the product of that person's will, but the presumption could be rebutted; that a person will not be presumed to act with criminal intent, but the jury could find intent upon consideration of the words, conduct, demeanor,

motive, and all other circumstances connected with the act for which an accused is prosecuted. (T.T. 191-192).

The trial court also read the statutory definition of murder and charged that the jury must find malice aforethought, either express or implied, beyond a reasonable doubt before they could find the defendant guilty of murder. (T.T. 195-196).

CONCLUSIONS OF LAW

The jury charge on intent is virtually identical to charges upheld in Skrine v. State, 244 Ga. 520 (1979), and Tucker v. State, 245 Ga. 68 (1980). In both instances, as here, the type of presumption created was merely a permissive one, which the trier of fact was free to reject or apply. Sandstrom v. Montana, supra, is readily distinguished on the ground that Sandstrom's jury "were not told the presumption could be rebutted." 61 L.Ed.2d at 46. Here, jurors clearly were told the presumption could be rebutted.

Petitioner objects to the definitions of express and implied malice in the charge, which are, in fact, the statutory definitions of express and implied malice. Cf. Ga. Code Ann. §26-1101(a). His claim that such definitions are burden-shifting has been previously rejected by the Supreme Court. Cf: Thomas v. State, 240 Ga. 454, 455 (1978); Pulliam v. Balkcom, 245 Ga. 99, 101 (1980).

A jury charge must always be viewed as a whole. Patterson v. State, 239 Ga. 409, 415 (1977); Thomas v. State, supra. When viewed as a whole, a reasonable

juror could not have interpreted the charge as either conclusive or burden-shifting. County Court of Ulster v. Allen, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979); Skrine v. State, supra.

Accordingly, this claim for relief is found to be without merit.

12.

In Count 12, Petitioner alleges the Supreme Court's reinstatement of his death sentence without affording him an opportunity to be heard violates his constitutional rights.

The Court is unaware of any such procedural requirement. Accordingly, the allegation is found to be without merit.

13.

The allegation in Count 13 is deemed abandoned because no evidence or argument was presented on the issue.

14.

In Count 14, Petitioner claims that infliction of the death penalty upon a person who was nineteen years old, had no prior criminal record, and whose culpability was alleged to be diminished by intoxication is cruel and unusual treatment under the Eighth and Fourteenth Amendments and the Georgia Constitution.

Juries have imposed the death penalty where evidence presented in mitigation showed a defendant had a very

low intelligence and was socially maladjusted, Corn v. State, 240 Ga. 130, 141 (1977); or had no prior criminal record and was allegedly under the influence of alcohol or drugs at the time of the offense, Bowen v. State, 244 Ga. 495 (1979), Tucker v. State, 244 Ga. 720 (1979). Further, the Supreme Court has already concluded Petitioner's death sentence is "not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant." Baker v. State, 243 Ga. at 713.

Accordingly, this allegation is found to be without merit.

15.

Petitioner contends his constitutional rights were violated by the trial court's failure to explain the relationship between aggravating and mitigating circumstances or that mitigating circumstance could act to outweigh aggravating ones to require a life sentence in the sentencing phase.

FINDINGS OF FACT

The jury were instructed that the death penalty could be imposed only if the jury found, beyond a reasonable doubt, one or more statutory aggravating circumstances. (T.T. 303). The jury were told they could recommend life if they did not find any statutory aggravating circumstances. (T.T. 305). They were told they should consider all of the evidence submitted in both phases of trial, which would include any

evidence of mitigating circumstances. Id. The jury were told they were not required to recommend death if they found the existence of aggravating circumstances. Id. They were told the sentence was a matter entirely within their discretion; that they could provide for a life sentence for any reason satisfactory to them or without any reason, if they chose. (T.T. 306). Finally, the jury were told that if the State failed to prove the aggravating circumstances beyond a reasonable doubt, they were not authorized to recommend the death penalty. Id.

CONCLUSIONS OF LAW

There is no requirement that a jury be instructed that mitigating circumstances are to be weighed against aggravating circumstances. Gates v. State, 244 Ga. 587(6) (1979).

Here, the jury was instructed to consider all the evidence in aggravation and mitigation and that they could recommend life even if they found the existence of an aggravating circumstance. The jury was properly instructed as to what to consider in reaching its decision as to sentence. Spivey v. State, 241 Ga. 477 (1978); Gates v. State, supra.

Accordingly, this claim for relief is found to be without merit.

16., 17., 18.

In Counts 16, 17, and 18, Petitioner attacks the constitutionality of Georgia's death penalty statute

in application and theory. Specifically, Petitioner charges the death penalty is administered and applied arbitrarily and capriciously; that his death is being exacted pursuant to a pattern by Georgia authorities to discriminate on grounds of sex, race, and poverty; and, that there are no theoretical justifications for the death penalty.

Petitioner has presented no proof on these issues. Accordingly, these claims for relief are found to be without merit.

19.

In Count 19, Petitioner challenges the constitutionality of Ga. Code Ann. §59-805 governing the use of peremptory challenges. Specifically, Petitioner alleges the statute allows prosecutors to eliminate all blacks from a jury, which deprives a defendant of the right to a fair trial, to a representative cross-section of the community, and to a reliable, non-arbitrary sentencing procedure.

FINDINGS OF FACT

Petitioner's trial counsel testified that the prosecutor used his premptory challenges to strike all blacks from the jury. (H.T. 72).

CONCLUSIONS OF LAW

A peremptory challenge is an arbitrary and capricious species of challenge to a certain number of jurors allowed to the parties within the necessity

of showing any cause therefor. In the very nature of such a challenge no reason need be shown or assigned for the exercise of the right, Hobbs v. State, 229 Ga. 556(6)(1972); Jordan v. State, 235 Ga. 732(1)(1975).

Petitioner has presented no proof of any systematic striking of blacks, a showing which must be made to overcome the presumption that the prosecutor is using the State's challenges to obtain a fair and impartial jury. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965); Jordan v. State, supra.

Accordingly, this allegation is found to be without merit.

WHEREFORE, all allegations in the Petition having been found without merit, the Petition is denied.

SO ORDERED, this 14 day of October, 1981.

Alex Crumbley

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Application No. 1864

FEB 6 1982

SUPREME COURT OF GEORGIA

ATLANTA, December 3, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

DANIEL JOSEPH BAKER V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby DENIED.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

Supreme Court of the United States

No. A-713

DANIEL JOSEPH BAKER,

Petitioner

v.

WALTER D. ZANT, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 2, 19 82.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 16th day of February, 19 82.

This case involves the following provisions of the Georgia Code:

Ga. Code Ann. § 26-3102

> "Capital offenses; jury verdict and sentence.
>
> Where, upon a trial by jury, a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the jury verdict includes a finding of at least one statutory aggravating circumstance and a recommendation that such sentence be imposed. Where a statutory aggravating circumstance is found and a recommendation of death is made, the court shall sentence the defendant to death. Where a sentence of death is not recommended by the jury, the court shall sentence the defendant to imprisonment as provided by law. Unless the jury trying the case makes a finding of at least one statutory aggravating circumstance and recommends the death sentence in its verdict, the court shall not sentence the defendant to death, provided that no such finding of statutory aggravating circumstance shall be necessary in offenses of treason or aircraft hijacking. The provisions of this section shall not affect a sentence when the case is tried without a jury or when the judge accepts a plea of guilty."

Ga. Code Ann. § 27-2534.1

> "Mitigating and aggravating circumstances; death penalty.
>
> (a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.
>
> (b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:
>
> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
>
> (2) The offense of murder, rape, armed robbery, or kidnapping was committed

while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in change and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond

a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in Code Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Ga. Code Ann. § 27-2537

"Review of death sentences.

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The Court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence."